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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1927

NO. 611

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Plaintiff in Error,

vs.

AUGUST E. HOMBERG,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

WYMER DRESSLER,
ROBERT D. NEELY,
Of Omaha, Nebraska,
RICHARD L. KENNEDY,
Of St. Paul, Minnesota,
R. N. VAN DOREN,
Of Chicago, Illinois,
Counsel for Plaintiff in Error.

THE COCKLE PRINTING CO., LAW BRIEFS, OMAHA, NEB.

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REFERENCE TO STATE COURT DECISION.

The opinion of the Supreme Court of Nebraska in this case is not yet reported in the official reports, but is found in 214 Northwestern Reporter 746, being case No. 24917, decided July 1, 1927. (R. 108)

GROUNDS ON WHICH JURISDICTION INVOKED.

The case is here on writ of error to the Supreme Court of Nebraska. The judgment of that court is dated July 1, 1927 (R. 108). Plaintiff in error claimed in the state court that Section 5527 Compiled Statutes of Nebraska 1922, as amended by Chapter 167 Laws of Nebraska 1923, seeking to compel railroads to build underground farm crossings for the convenience of land owners at railroad expense violates the due process clause of the 14th Amendment to the Federal Constitution, and the decision of the Supreme Court of Nebraska was in favor of the validity of said statute. Plaintiff in error also claimed in the Supreme Court of Nebraska that the order of the Nebraska State Railway Commission requiring the building of such underground crossing was unreasonable and violates the due process clause of the 14th Amendment to the Federal Constitution and therefore void, and the decision of the state court was in favor of the validity of said order. Plaintiff in error also claimed in the Supreme Court of Nebraska on rehearing (R. 123) that Section 20 of Article IV of the Constitution of Nebraska creating the Nebraska State Railway Commission as construed by the Supreme Court of Nebraska in this case is in violation of the equal protection clause of the 14th Amendment to the Federal Constitution, but the decision of the Supreme Court of Nebraska overruling said motion is in favor of the validity of said state constitutional provision.

Great Northern Railway Company vs. Cahill,
253 U. S. 71.

STATEMENT OF THE CASE.

August E. Holmberg, defendant in error, is the owner of the Northwest Quarter (NW¼) of Section Twenty-four (24) Township Twenty-nine (29), North, Range Two (2), West of the 6th P. M., in Knox County, Nebraska, having owned the farm for about 15 years (R. 1, 14). The railroad of plaintiff in error bisects this quarter section of land from northwest to southeast and was built many years before defendant in error became the owner of the farm. The land is devoted to ordinary farm purposes (See plat of farm (R. 46)). At the time defendant in error purchased the farm there existed an ordinary surface farm crossing in the northwest part of the quarter section connecting the two halves of the farm (R. 24, 27). This crossing has always been maintained in good condition and is now in good condition for farm uses (R. 47), equipped with suitable gates (R. 29, 47). The land is used for ordinary farming purposes (R. 94) with only the number and kind of ordinary farm livestock thereon (R. 93). This consists of 25 to 35 head of cattle and 4 horses (R. 74, 16), and about 90 head of hogs (R. 16) which is the most that defendant in error has had (R. 74), with no purpose to increase the numbers (R. 75). The farm buildings are located near the southwest corner of the quarter section (R. 71). To reach the northeast half of the farm from the farm buildings, defendant in error must travel or drive his livestock 60 to 80 rods northeast to the private farm crossing (R. 71, 72). On the northeast side of the railroad track the farm is devoted to pasture and hay land and some plow land. There is no evidence in the record that any accident of any kind has ever occurred at this farm crossing and no evidence that

defendant in error has ever made any complaint to the Railway Company concerning the location or condition of the farm crossing. On the northeast side of the farm, defendant in error maintained for a number of years a well and pump to supply water to his livestock (R. 72, 73, 77) in addition to the well and windmill in the southwest part where the buildings are located. There is nothing unusual about this farm or the railroad track which would entitle defendant in error to an underground passageway for his livestock any more than any farmer whose farm is bisected by the railroad would be entitled to such a convenience. (R. 39-40).

However, on March 29, 1922, defendant in error filed a written complaint with the Nebraska State Railway Commission (R. 60), praying that on account of its being "very inconvenient for your applicant to transfer cattle and stock from one side of the track to the other" that the Railway Company be required under the provisions of Section 4, Chapter 261, Laws of Nebraska 1921, to build an underground passageway for the accommodation of plaintiff's livestock.

Plaintiff in error answered this complaint (R. 63). denying such necessity; setting forth that a suitable surface crossing already existed for the accommodation of the farm and that the farmer, under the statute, was not entitled to a second means of crossing said railroad track, and prayed that the complaint be dismissed. The Railway Commission held a hearing on the complaint on the 28th day of June, 1922, and on the 28th day of July, 1922, entered an order containing an opinion and finding of fact (R. 64) dismissing the complaint on the ground "the

evidence does not show that the crossing is inadequate" and "evidence shows that plaintiff already has watering facilities for stock on both sides of the track," and that the present situation is no different than it has existed for twenty years. That the farm is "devoted exclusively to agriculture * * *, has no livestock save such as is incidental to an agricultural farm consisting of 160 acres" and that " a level grade crossing suitably placed with good gates in the fence is provided and maintained for his use directly east of his buildings, permitting him to cross the tracks with his farm machinery of all kinds and with his live stock whenever he desires to reach the east portion of his farm. On the east side the farm is devoted to the cultivation of corn and small grain with a narrow strip of meadow about 30 rods east of the tracks," also "if he had an underground way as prayed for in his application, he would have no immediate use for the same. There is nothing on the east side of the track which could be used for pasture and livestock and there will be no such pasture there until the corn is harvested late in the fall. It is quite apparent that an underground crossing, as asked for by plaintiff, would be a convenience three or four months during each year late in the fall and winter, at a time when the stock on the farm is at liberty to run at large. This convenience, in the judgment of the Commission, is not sufficient to create a necessity that would come within the requirements of the statutes governing such matters."

The Statute, Chapter 261, *Laws of Nebraska* 1921, under which defendant in error made his first complaint is as follows (R. 66):

"Whenever any person owns land on both sides of the right of way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such landowner to cross the right of way. Any interested landowner, with land on both sides of the right of way of any railroad, may file written complaint with the State Railway Commission against any such railroad that the crossing is not adequate, and the commission thereupon shall make such investigation and hold such hearings as may be necessary, and shall issue such orders as it shall deem necessary, proper, and adequate. If circumstances warrant the commission may require overhead, underground, or grade crossings, and require wing fences at underground crossings, but where such special crossings involve an expenditure of more than six hundred dollars, the landowner shall bear one-half the expense in excess of six hundred dollars."

The Commission pointed out in its opinion (R. 67) that the Supreme Court of the State in *Postle vs. C. B. & Q. R. R. Co.*, 98 Neb. 192, had held with reference to this statute that where a surface crossing had been in use by the farmer for a number of years, a different type of farm crossing could not be required "unless changed physical conditions" rendered some other type of crossing necessary, and the Commission concluded:

"After a careful consideration of all the evidence, it is the judgment of the Commission that the real need for an underground way for stock on plaintiff's farm is not sufficiently apparent to require an improvement of this nature at this time."

There was no appeal from this order denying the prayer of the complaint.

Subsequently, and on September 16, 1924, defendant in error filed another complaint (R. 1) before the Nebraska State Railway Commission again praying that plaintiff in error be required to build an underground crossing "as contemplated by Section 5527 of Compiled Statutes of Nebraska for 1922." This section of the Statute as amended by Chapter 167, Laws Nebraska 1923, is as follows:

> "Whenever any person owns land on both sides of the right of way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such land owner to cross the right of way. Any interested land owner with land on both sides of the right of way of any railroad may file written complaint with the State Railway Commission against any such railroad that the crossing is not adequate or is unsafe and dangerous to the life and property of those who use the same, and the commission thereupon shall make such investigation and hold such hearing as may be necessary, and shall issue such order as it shall deem necessary, proper and adequate. If circumstances warrant, the commission may require overhead, underground or grade crossings, and require wing fences at underground crossings, or may require existing crossings to be relocated so as to be safe to those who use them, but where such special crossing involves an expenditure of more than $700.00, the land owner shall bear one-half the expenses in excess of $700.00."

The only substantial change in the statute between the time of the first complaint and the second complaint is that the legislature had increased the initial expense of the improvement which the railroad must bear from $600.00 to $700.00 before the farmer would be called upon to share the expense.

Defendant in error assigned in his second complaint as the reason why he desired an underground crossing which had theretofore been denied him by the Commission, "plaintiff's advanced age and physical infirmity" (R. 3). No change in the physical situation of the land or the railroad was claimed or proved. To this second complaint the Railway Company filed its answer (R. 3) denying the necessity for an underground crossing; setting forth that the farm has a suitable grade crossing maintained in good condition, and that the farmer is only entitled to one crossing; that there has been no change in the situation since the previous order of the Commission denying the demands of defendant in error; that the expense of such an underground crossing would range from about $1,200.00 to about $2,100.00 depending upon the size of the crossing built, and prayed that the complaint be dismissed. The Railway Commission held a hearing on this complaint, and on May 22, 1925, entered an order (R. 7) requiring the Railway Company to build an underground crossing for the use of defendant in error, and in the order required that the Railway Company pay the first $700.00 of the expense of such improvement and that defendant in error pay 50% of the remainder of such expense, all of which was to be supervised by the Railway Commission.

The Company appealed to the Supreme Court of the State from this order, claiming that the order was unreasonable and void, in violation of the 14th Amendment to the Federal Constitution, and that Section 5527, Compiled Statutes of Nebraska, 1922, was likewise void because in violation of the 14th Amendment to the Federal Constitution. The order was affirmed by the Supreme

Court of the state. (R. 108). After the opinion in the case was filed, and within the proper time, the Railway Company asked for a rehearing, setting forth said complaints, and in addition thereto, that the constitutional provision of the state creating the State Railway Commission as construed by the Court in the opinion in the case, declaring the right of the Commission to exercise independent legislative, executive and judicial powers, was in violation of the equal protection clause of the 14th Amendment to the Federal Constitution. A rehearing was denied. (R. 117).

The record shows that the sole purpose of the proposed underground crossing is to serve the personal convenience of the present landowner. At the second hearing before the Railway Commission, defendant in error testified: That he is sixty years old (R. 14) and his present family at home consists of his wife, 59, and his daughter, 24. (R. 15). That he has no water supply for his live stock on the east side of the railroad track. (R. 16). (Apparently it was discontinued after the first hearing and before the second one.)

And that it is "too much trouble and bother" to drive cattle back and forth over the track. (R. 18 and 19). And that if he had an underground crossing "it would be a big advantage to me, because I would not have to go and get the cattle when I wanted them at night, and I thought that when they wanted water they would come home for it, and that would be quite a big advantage, and then they would go back to the pasture again." (R. 20). That he does not want to drive his cattle over the private crossing because "it is cultivated land on both sides." (R. 25). That he cannot think of

any difference in conditions now from what they were two years ago when the previous hearing was held (R. 26). That he has been using the pasture east of the railroad track for sixteen years. (R. 28). The idea of an underground passageway "is to get a passageway so that the cattle can go back and forth without being watched all of the time." (R. 28). The only difference in conditions now and what they were two years before is that the defendant in error is two years older. (R. 30). That it is about one thousand feet from his farm buildings to the private crossing already there. (R. 31). And he again stated that his reason for wanting an underground pass for the cattle is "because it is too much trouble to have them taken back and forth, and then to stay in the yard overnight." (R. 58). That a 74-inch pipe would be large enough for his purposes, and that assuming the cost of the cattle pass would be $1,606.00, that after the railway company paid the first $700.00, he would be willing to pay 50 per cent of the balance, or $453.00. (R. 59).

A neighbor, Floyd Thorell, testified for the defendant in error, (R. 39).

Q. "Mr. Holmberg's situation is not any different than every farmer has who works fields on both sides of the railroad track, is it?"

A. "It is, in a way. He wants to have an underground crossing to get his milk cows over."

Q. "Well, every farmer who works land on both sides of the track and happens to have a pasture on one side with the farm buildings on the other

side is in the same situation that Mr. Holmberg is?''

A. ''I suppose he would be.''

Q. ''There would not be anything peculiar about Mr. Holmberg's situation.''

A. ''Well, I wouldn't say that. I wouldn't say that there is.''

The railway company's evidence showed that the cost of installing this proposed underground crossing is $1,606.00. (R. 52). And plaintiff in error claims that whatever inconvenience results from dividing the farm by the railroad was paid for in the condemnation award when the right-of-way was acquired. (R. 43). That since the evidence shows defendant in error has actually been able to use the east side of his farm by means of the private surface crossing all these years, (R. 76) the efficiency of the surface crossing is conclusively established.

There is nothing in the evidence or the order of the Railway Commission or the opinion of the Supreme Court of Nebraska indicating any willingness or purpose that Mr. Holmberg is expected to take any legal steps to acquire the right to establish another right of way across the railroad property, or to compensate the railway company therefor. Rather, the proposition seems to be that the order of the Railway Commission is sufficient to confer upon Mr. Holmberg title to the right of passage under the railway tracks in perpetuity for his private convenience without compensation to the railway company. Plaintiff in error denies the right of the state or any of its agencies to condemn private property for private use without compensation.

ERRORS RELIED UPON.

Plaintiff in error relies upon the following errors of the Supreme Court of Nebraska in this case.

I.

The Supreme Court of Nebraska erred in holding and deciding that Section 5527 Compiled Statutes of Nebraska for 1922, as amended by Chapter 167 Laws of Nebraska 1923, does not violate the Fourteenth Amendment to the Constitution of the United States nor deprive plaintiff in error of its property without due process of law nor take property for private use without compensation.

II.

The Supreme Court of Nebraska erred in holding and deciding that Section 20 of Article IV of the Constitution of Nebraska creating the State Railway Commission as construed by the said Court in its opinion in this cause does not deny to plaintiff in error equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiff in error contends that equal protection of the law is denied by said provision of the State Constitution as construed by the Court in this cause for the following reasons:

The people in adopting the Constitution of the State of Nebraska construed a form of government for the citizens generally, whereby the exercise of despotic and arbitrary power is rendered impossible by a clear division and separation of the sovereign power into separate departments, the legislative, the executive and judicial, and declaring that "no person or collection of persons being one of these departments shall exercise

any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." (Art. II, Constitution of Nebraska.) Article III then vests the right of initiative and referendum. Article IV, Section I, designates who the executive officers of the state shall be. This form of government for the citizens generally accords with fundamental notions of civil liberty. Notwithstanding this careful protection of the liberty of citizens generally, the people of the state by Section 20 Article IV of the Constitution, as construed by the state Court, have denied to appellant and other railroads the protection of Article II of the Constitution, by conferring upon the State Railway Commission, "independent legislative, judicial and executive or administrative powers," and "in the exercise of its prerogatives, the Nebraska State Railway Commission is not subject to direction or criticism by the Courts," so far as relates to "regulation or rates, service and general control of common carriers." Thus appellant and other railroads are left to the mercy of despotic and arbitrary power of three men, exercising sovereign power so far as the vital rights and interests of railroads are concerned. This is a denial of equal protection of the laws at the hands of the state as required by the Fourteenth Amendment to the Constitution of the United States.

III.

The Supreme Court of Nebraska erred in holding and deciding that the order of the Nebraska State Railway Commission appealed from in this case is not unreasonable and therefore not in violation of the Four-

teenth Amendment to the Constitution of the United States and that it does not deprive plaintiff in error of its property without due process of law nor deny to plaintiff in error equal protection of the law within the meaning of said amendment to the Constitution of the United States.

IV.

The Supreme Court of Nebraska erred in holding and deciding that the police power of the State authorizes orders of the Nebraska State Railway Commission requiring grade separation for the purpose of building runways under the railroad track for the exclusive use of hogs and cattle to the same extent that the police power of the State authorizes grade separation for the protection of the traveling public.

V.

The Supreme Court of the State of Nebraska erred in holding and deciding that it is not a violation of the obligation of contract represented by the condemnation award which plaintiff in error paid for the right to construct its railroad track over and across the land of defendant in error for the State thereafter to require the Railway Company at its expense to construct underground runways for hogs and cattle under the tracks of plaintiff in error, as a matter of private convenience for said land owner.

SUMMARY OF ARGUMENT.

I.

A railroad right of way acquired by condemnation or purchase and in actual use for railroad purposes cannot be taken by the State even for a public purpose until just compensation has been made to the owner.

Delaware L. & W. Railway Co. vs. Town of Morristown, U. S. Supreme Court, decided February 20, 1928.

M. K. & T. Railway Co. vs. Oklahoma, 271 U. S. 303-308.

II.

The State cannot take such property for private purposes at all, except by consent of the owner.

Delaware L. & W. Ry. Co. vs. Town of Morristown, supra.

III.

Such a taking of property without compensation is an infringement of the constitutional rights of the owner guaranteed by the due process clause of the 14th Amendment to the Federal Constitution.

(Cases supra.)

IV.

The order of the Nebraska State Railway Commission whether based on said statute, or upon the independent legislative power of the Commission, seeking to take a part of the railroad company's right of way without com-

pensation, whether for a public or private purpose, is arbitrary and void as in violation of the 14th Amendment of the Federal Constitution.

(Cases supra)

Great Northern Railway Co. vs. Cahill, 253 U. S. 71.

Great Northern Railway Co. vs. Minnesota, 238 U. S. 340.

V.

Even under Nebraska law for citizens generally, the State cannot open a public road or way without first making compensation to private land owners for property so taken or damaged.

Van Wagging vs. Deeter, 78 Neb. 282,

Scottsbluff County vs. Land Company, 93 Neb. 805,

Rule vs. Sioux County, 94 Neb. 736.

VI.

And cannot take private property for private purposes at all.

Jenal vs. Green Island Draining Co., 12 Neb. 166.

Welton vs. Dickson, 38 Neb. 774.

VII.

The police power of the State to require grade separations, at railroad expense, where the railroad and a public road or street crosses is distinguished from the at-

tempted exercise of such power to take a private way for livestock, without compensation, and at railroad expense. The State court's opinion is this case confuses these principles.

VIII.

A private runway for livestock under the railroad track is not a public highway within the meaning of the police power referred to.

IX.

The proposed runway under the track is not capable of use by the land owner for teams, vehicles or machinery, hence the surface crossing is still necessary, which fact destroys the theory that grade separation will eliminate the possibility of accidents.

X.

A fair construction of Section 5527 Compiled Statutes of Nebraska, 1922, as amended, shows that it was the legislative purpose to have only one crossing capable of use by the land owner for all purposes. Such has heretofore been the construction of the statute by the state supreme court.

Omaha & R. V. Railroad Co. vs. Severin, 30 Neb. 318.

Postle vs. C. B. & Q. R. R. Co., 98 Neb. 192.

XI.

To compel the railroad to spend about $1,200.00 now, in addition to forfeiture of the necessary ground on its

right of way, to build a stock runway for the land owner's private convenience, is a violation of the award or judgment in the condemnation proceedings at the time the railroad right of way was acquired; all elements of inconvenience to the land owner having been fully included in such award.

Section 5278 *Compiled Statutes of Nebraska* 1922,

Section 5283, Same,

C. B. & Q. vs. O'Connor, 42 Neb. 90,

Churchill vs. Beethe, 48 Neb. 87,

Beckman vs. Lincoln & Northwestern Railroad Co., 85 Neb. 228.

XII.

Assuming that Section 5527 Compiled Statutes of Nebraska, 1922, as amended by Chapter 167 Laws of Nebraska, 1923, is void as applied in this case: The only legislative power left in support of the order of the railway commission is its "independent legislative power" under Section 20, Art. IV of the Nebraska Constitution.

It is a denial of equal protection of the law to plaintiff in error and other railroads, in violation of the 14th Amendment to the Federal Constitution, for the people of the State to create for railroads a plan of government which combines all sovereign power, legislative, executive, and judicial, in one Commission; while for citizens generally the sovereign power is separated into distinct departments, none of which may exercise any of the powers properly belonging to the other departments.

Compare *Arts. II, III, IV and V, Nebraska Constitution with Sec.* 20, *Art. IV.*

ARGUMENT.

As we have seen from the statement of the case and an examination of the plat (R. 46) the order of the State Railway Commission requires the Railway Company to cut a new opening in its railroad track about 7 or 8 hundred feet southeast of an already established grade crossing for the private use and convenience of the land owner. There is no suggestion in the record of any desire on the part of the land owner to have the surface crossing moved to a different location. After using this surface crossing for 15 years or all the time he has owned the land, he concludes that it will be more convenient in handling his livestock to have a runway under the track so that he will not be obliged to conduct them across the railroad right of way. For this purpose he wants the Railway Company to give up possession and use of such portion of its right of way as may be necessary to construct this private runway, without compensation for the land taken, and he wants the Railway Company to pay approximately $1,200.00 of the $1,600.00 expense of the actual construction of the proposed cattle pass. The State Railway Commission when first appealed to denied any necessity of the land owner for such a convenience, and the validity of the Statute in question was not therefore raised. But on renewal of the application, the Commission orders the Railway Company to do what the farmer desires, and the Supreme Court of the State has affirmed that order as a reasonable and constitutional requirement. There can be no question that the sole and only purpose of the cattle pass is to serve the private convenience of the land owner. It is not a public way in any respect. The proposed cattle pass cannot be used by any

human being. It is to be a 74 inch reinforced concrete pipe, capable of affording a runway for cattle, horses and hogs. The runway would be incapable of accommodating the farmer's teams, wagons, machinery, etc., which he might desire to conduct over the right of way. These things must still use the surface crossing. There is no evidence that any accident of any kind has ever occurred at the private crossing to either person or property, and none has occurred. The territory is level and the only place on the farm where it would be physically possible to install an underground runway is at the location proposed. Otherwise, a surface crossing could be installed any place within the limits of the farm. The Railway Company acquired its right of way through this farm many years ago by condemnation proceedings. It, therefore, owns the right of way for railroad purposes and is in active use and operation of its right of way for such purpose.

I.

A railroad right of way acquired by condemnation or purchase and in actual use for railroad purposes cannot be taken by the State even for a public purpose until just compensation has been made to the owner.

This principle is so well settled that it has become elementary. The recent case of *Delaware, L. & W. Railroad Company vs. The Town of Morristown,* being No. 147 October 1927 term of this court, decided February 20, 1928, seems to us clearly in point. There the town sought by ordinance to appropriate a part of the railroad station grounds and private driveway for a public hack-stand on the theory that, the ground being devoted to a public use,

the State may appropriate that ground under the police power for a public hack-stand. But this Court said:

> "The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purpose of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property used belongs to petitioner. The State may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment."

In *M. K. & T. Railway Co. vs. Oklahoma,* 271 U. S. 303, an order of the Corporation Commission of Oklahoma requiring the building of an underground crossing for a public street where none had existed before was challenged as in violation of a contract between the railroad and the city which provided that as a part of a compromise involving numerous unauthorized crossings that whenever the City desired to extend Comanche Avenue across the Company's right of way there should be an underground crossing at the expense of the City. The Corporation Commission sought to require the Railway Company in violation of that agreement to bear a portion of that expense. Reviewing the relative rights of the parties, this Court said:

> "When the ordinance was passed, it was the purpose of the parties to get rid of unauthorized

> crossings then in use and to arrange for the extension of platted streets across the tracks and station grounds. It was necessary for the city to obtain rights of way for that purpose; and it was empowered to acquire them by contract, purchase or condemnation. * * * It could not take them without making just compensation to the owner. * * * It was entitled to compensation for any of its property that might be taken or damaged by the construction and use of the crossing."

So that the authority of the State, whether through statute or an order of the State Railway Commission to take a portion of the railroad right of way even for a public highway or street or way must be exercised on the precedent condition that the owner be compensated for the land thus taken.

II.

But when the undisputed purpose is to furnish a new road or way of convenience for a private individual with no possibility that the public can ever have any use of such way, the State has no power to take the property. What property is proposed to be taken by the order of the Commission? First, it is proposed to take the necessary ground across the railroad right of way for the improvement. No compensation is offered, arranged for, nor suggested. On the contrary, the order assumes that the railroad is not entitled to any compensation for this ground although it is being taken to be devoted to the private use of Mr. Holmberg in perpetuity. Second, the order of the Commission proposes to take from the railroad company approximately $1,200.00 representing the

larger part of the cost of the proposed convenience for Mr. Holmberg. The railroad right of way is devoted to railroad purposes. As such, it is private property, subject only to such reasonable regulations as the State may impose for the benefit of the public using such railroad facilities. Mr. Holmberg does not propose to use the cattle pass for any railroad purpose nor as a patron of the railroad. It is a private enterprise from which all other members of the public are excluded. We think the language of *Delaware L. & W. R. R. Co. vs. Town of Morristown,* supra, is applicable:

> "As against those not using it for the purpose of transportation, petitioner's railroad is private property in every legal sense. The driveway in question is owned and held by petitioner in the same right and stands on the same footing as its other facilities. Its primary purpose is to provide means of ingress and egress for patrons and others having business with the petitioner. But, if any part of the land in the driveway is capable of other use that does not interfere with the discharge of its obligations as a carrier, petitioner as an incident of its ownership and in order to make profit for itself has a right to use or permit others to use such land for any lawful purpose. * * *
>
> "* * * The enforcement of the ordinance here assailed would operate to deprive petitioner of the use of the land in question and hand it over to be used as a public hack stand by the individual defendants and others. As to them, and so far as concerns its use as a public hack stand, the driveway was petitioner's private property and could not be so appropriated in whole or in part except upon the payment of compensation.

"Under the guise of regulation, the town cannot require any part of the driveway to be used in a service that petitioner is under no duty to furnish. And, as petitioner's duty here involved is confined to the business of carrying passengers by railroad, the declaration of the ordinance that the specified part of the driveway 'is hereby designated and established as an additional public hack stand' clearly transcends the power of regulation. To compel the use of petitioner's land for that purpose is to take it without compensation in contravention of the constitutional safeguard here invoked."

III.

It is apparent that the order of the Nebraska State Railway Commission not only takes the private property of plaintiff in error so far as the necessary portion of the railroad right of way is concerned, and hands it over to Mr. Holmberg for his exclusive use without any compensation to the owner, but it also takes $1,200.00 in money from the Railway Company—money earned in the transportation of property and passengers—and hands that over to Mr. Holmberg as a permanent investment for his private advantage. We deny the power of the State to do that.

IV.

We think the order of the Railway Commission involved here is no less arbitrary than the order of the State Commission involved in *Great Northern Railway Company vs. Cahill*, 253 U. S. 71. There the State Commission ordered the Railway to install and maintain cattle scales at various stations on the theory that such scales were desirable and necessary to enable shippers to check

the weights of cattle shipped to know whether they were being charged the correct amount of freight charges. But this Court observed that freight charges are uniformly based upon delivery weights at destination and that stock scales at the various stations are used almost exclusively by dealers in livestock for their private convenience, and that the order of the Railway Commission was arbitrary and void. A similar order of the Railway Commission of Minnesota was held arbitrary and void in *Great Northern Railway Company vs. Minnesota,* 238 U. S. 340.

The evidence in this case shows that Mr. Holmberg's farm is not situated differently than any other farm which is bisected by the railroad right of way. He is no more entitled to an underground runway for his stock than every other farmer along the railroad is entitled to. If the State may require the railroad at large expense to install such an underground cattle way for Mr. Holmberg, such convenience may be required for every farmer along the railroad track. Such a rule would surely result in ruinous expense to the railroad company without one cent of corresponding advantage to the public. We believe the only legitimate exercise of police power of the State to compel railroads to spend substantial sums of money for improvements must be limited, first, to improvements which will increase the usefulness of the railroad as a public transportation facility, or, second, which will tend to decrease the hazard of railroad operation to the traveling public on public highways. Inasmuch as the public could never have access to such private runway, no possible ground exists for contending that the improvement is an exercise of the police power in the interest of public

health or safety. Indeed, when we consider that the proposed runway is not designed to accommodate anything but livestock, leaving the farmer and his family and his wagons and machinery to use the surface crossing as heretofore, all suggestions of safety disappear.

V.

Even under Nebraska law the State cannot open a public road or way without first making compensation to private land owners for property so taken or damaged.

For illustration, Section 2607 Compiled Statutes of Nebraska 1922 declares that every section line is a public road in each county in the State, and that the County Board may open such roads whenever, in their judgment, the public good requires it. But it has been held that this does not relieve the County from paying the owner of the land for the highway thus opened. Under this statute, the Supreme Court of Nebraska, *in Rule vs. Sioux County*, 94 Neb. 736-739, says:

> "* * * It is contended that the act of congress of 1866, granting the right of way over public lands, having been accepted by the legislature of Nebraska, plaintiff is not entitled to any damages for the opening of the section-line roads in question. As was said in Scotts Bluff County v. Tri-State Land Co., 93 Neb. 805, 'This statute (meaning the statute accepting the grant) dispenses with formal, preliminary proceedings in the opening of highways on section lines, but preserves the landowner's right to compensation for property taken or injured. Scace v. Wayne County, 72 Neb. 162; Barry v. Deloughrey, 47 Neb. 354.' The grant in question is limited by the proviso

contained in the act of acceptance, that 'any damages claimed by reason of the opening of any such road shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided.' The enactments to which the proviso refers provide a method of compensating an owner for land taken or damaged for highway purposes. * * * The word 'owner' as used in the statute applies to all persons having an interest in the estate taken or damaged."

For example, if the State or a subdivision thereof, desired to open a new public highway even on a section line which crossed the railroad right of way, the State could not lawfully open such road until it had first acquired from the Railway Company by condemnation or purchase the right to cross and had paid the Railway Company full compensation for the land thus taken. How, then, can the State either directly by statute, or through an order of the State Railway Commission, go through the right of way of plaintiff in error at a point where there is no way, either public or private, and seize a portion of that right of way for a new private way for Mr. Holmberg without the consent of the Railway Company and without compensation. Surely the State cannot do that without violating the 14th Amendment to the Federal Constitution. It is mere confiscation of the Railway Company's property.

VI.

It has been long held in Nebraska as to the rights of citizens generally that the legislature cannot take private property for private use except by the consent of the owner (see cases under point No. 6).

Yet the Supreme Court of Nebraska in its opinion in this case seeks to justify the order of the Commission taking the right of way and money of plaintiff in error for the private convenience of Mr. Holmberg as an exercise of the police power. The police power of the State to require grade separation at railroad expense where the railroad and a public road or street cross is distinguishable from the attempted exercise of such power to take a private way for livestock without compensation and at railroad expense. The State Court's opinion in this case confuses these principles. The State Court replies, as authority for its decision, upon C. M. & St. P. Railroad Co. vs. Minneapolis, 232 U. S. 430. We cannot see the applicability of that decision to the present facts. In that case there was an existing public street in actual use by the public across the railroad track. The public presumably had already acquired the right to cross the track with the street. When the Railway Company was required to elevate its track or build a viaduct at that crossing it was clearly in the interest of the safety of the traveling public on an existing public street. Is there no distinction between the police power of the State to require grade separation under such circumstances and the power of the State to require grade separations for the safety of pigs and cattle on private farms? The State Court's opinion implies that there is no distinction. We think there is. The meaning of the police power, as we understand it, in this respect embraces the safety and health and convenience of the public. And by the public we mean the people who constitute the public in their group capacity. The State Court's opinion says:

"The application of the principles of constitutional law upon which the defendant bases its contention to the facts in this case discloses that the fundamental question involved here is the right of the state, by the exercise of its police power, to eliminate the perils of grade crossings * * *.

"A consideration of cases above cited discloses that the source of the state's authority to adopt regulations for public safety at grade crossings is the police power of the state, and that the elimination of grade crossings, is within the scope of that power. The fundamental fact upon which its existence is justified is that its exercise promotes the safety of either or both of two distinct classes: (1) The passengers transported by the railways; and (2) travelers proceeding over the intersected way. These considerations apply to farm grade crossings * * * The regulation and elimination of farm grade crossings must therefore be deemed properly within the scope of the police power. * * * The extent and conditions upon which this power will be exercised obviously is a matter of legislative discretion on the part of the state."

Analyzing the Court's reasoning:

First, there is no evidence in the record that any accident has ever occurred to any railroad train or person or animal on Mr. Holmberg's farm. None has occurred. To justify taking from the Railway Company a portion of its right of way without compensation and $1,200.00 in money merely to provide an underground runway for the farmer's hogs and cattle on the theory that the State is thereby promoting the safety of passengers on the trains seems fallacious. Is it true that the State has

power to require every railroad now existing to elevate its tracks not only at all public highway crossings both in the city and the country, but to elevate its track everywhere? It would be impossible to eliminate the hundreds of farm crossings without doing that. Needless to say, such an exercise of power would confiscate every railroad in the State. The owners would be much better off to abandon the railroads entirely and the entire industry than attempt to comply with such regulation.

Since, therefore, such regulation would be confiscation, it is an unreasonable suggestion and not a proper and valid exercise of police power. The second ground given by the State Court to justify this order is that it is in promotion of the safety of travelers over the intersected way. In the first place, the present grade crossing is not a public highway but is purely a private way. In the second place, hogs and cattle and horses surely are not *travelers* in the sense that the police power of the State extends to the protection of travelers over public ways. We are necessarily confined to a consideration of the safety of livestock in this case because the proposed underground way is designed solely for the accommodation of livestock. The surface crossing for the farmer and his wagons and implements remains where it is. In the absence of any evidence that the passage of livestock over this farm crossing constitutes a substantial menace to the safe operation of trains, we cannot discover any room for the exercise of the police power on the subject. The Railway Company is not appealing to the State for the protection of trains against livestock on Mr. Holmberg's farm; it has had no occasion to do so. The

passengers on the trains are not complaining; they have had no occasion to complain. How unusual it would be for the State to exercise such supposed police power for the protection of passengers on the train at the request of a farmer who is to be sole beneficiary from the exercise of such power. We deny, therefore, that the power exists. The order of the Railway Commission is arbitrary and a clear confiscation not only of the portion of the railroad right of way necessary for the runway, but $1200.00 in money besides. True, the police power of the State is frequently exercised on the subject of livestock, such as quarantine regulations to prevent the spread of disease among livestock, or inspection regulations to insure pure food from the meat of livestock, or humane reasons, such as the 28 hour law of Congress. But to claim that the police power for the protection of the safety of livestock may be exercised to require grade separation at farm crossings to the same extent as the State may require at public crossings in protection of human life we submit transcends the legitimate scope of the police power, and the State Court is surely wrong in that respect.

VII.

While we understand that the State Court's construction of a state statute is binding on this Court, yet a mere reading of Section 5527 Compiled Statutes of Nebraska 1922 as amended by Chapter 167 Laws of Nebraska 1923 shows that not only is the Railway Commission's order beyond the intended scope of the statute, but likewise the State Court's opinion is beyond anything the legislature intended. It reads:

CORRECTION:

> "When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same."

This was the Statute as it existed for many years up until the year 1921. Under this language the State Court had held in *Omaha & R. V. Railroad Co. vs. Severin,* 30 Neb. 318:

> "The words of the Statute, 'one causeway or other adequate means of crossing the same,' indicate the legislative judgment that a causeway, whatever it may be, when applied to a railroad, is an adequate means of crossing the track. If the section only applied to such a part of a railroad as is known as a fill, where the roadbed is raised by an embankment above the natural level of the land, it would be reasonably clear that the causeway intended was a raising of the crossroad adjacent to the railroad track with gradients on either side for the convenience of crossing with carriages, wagons, and by horsemen. And I can conceive of no other sense in which the language could have been used in the present instance. Surely the word is not to be confounded with viaduct or bridge, as that means of crossing a railroad could only be cheaply or economically used where there is a very deep cut, which is not common to railroads in this state. This section applies as well to uncultivated as to cultivated land, and to that uninclosed as well as to that which is fenced. The ownership of land, on both sides of the railroad, gives the right of the causeway, or other adequate means of crossing, and not the ownership or possession of live stock by the land owner. The right of an owner

of land on both sides of a railroad to an adequate means of crossing from one part of the land to the other, doubtless within the meaning of the statute, implies the right of such owner to such means of crossing, with any domestic animals under his control. But a careful reading of the fifty sections of the sub-chapter fails to indicate that it was in the legislative mind to provide for unherded animals wandering from one side of a railroad to the other. Neither cattle nor animals are mentioned in the statute, and, as we have seen, the ownership nor possession of cattle adds to the right of an owner of land to adequate means of crossing; the conclusion is therefore not only logical but irresistible that a means of crossing that is adequate for one owner of land on both sides of a railroad is, in contemplation of the statute, adequate for all such owners. If not, then such adequacy depends upon the character of the railroad track and right-of-way between the lands of such owners, whether level, cut, or fill, not upon the use of the land on either side of the railroad, nor upon the possession of cattle by such owner."

And the Supreme Court also held in *Postle vs. C. B. & Q. R. R. Co.*, 98 Neb. 192:

"Where 27 years have intervened between the date of an agreement made by the owner of land with a railroad company concerning the construction of a private farm crossing, and the railroad company, in compliance with the agreement, has constructed and maintained an adequate grade crossing, there is no obligation upon it to build an overhead crossing merely for the convenience of the landowner, unless changed physical conditions require such overhead crossing.

"Where, under such circumstances, it is shown that the railroad company is willing to construct the overhead crossing if the complainant will pay the cost of construction and maintenance, there is no sufficient ground of complaint against the railroad company."

In 1921 and 1923 the Statute was amended by adding the following (Italics ours):

"Any interested land owner with land on both sides of the right of way of any railroad may file written complaint with the State Railway Commission against any such railroad that the crossing *is not adequate* or is unsafe and dangerous to the life and property *of those who use the same*, and the Commission thereupon shall make such investigation and hold such hearing as may be necessary and shall issue such order as it shall deem necessary, proper and adequate. If circumstances warrant, the Commission may require overhead, underground or grade crossings, or may require wing fences at underground crosings, or may require existing crossings to be relocated so as to be safe *to those who use them*, but where such special crossing involves an expenditure of more than $700.00, the land owner shall bear one half the expenses in excess of $700.00."

It seems clear to us that the legislature by these later provisions had reference to the safety of the farmer and members of his family who might have occasion to use the surface crossings. The legislature was not speaking of the safety of live stock. Moreover, it is only "if circumstances warrant" that the Commission is in any instance authorized to order an underground crossing. As we have seen, there is no evidence in this case warranting

any such order. Mr. Holmberg is in the same situation as any other farmer whose land lies on both sides of the track.

VIII.

Since the evidence shows conclusively that the underground runway is solely for the private convenience of the land owner, we deny the power of the State to require a railroad company to give up a part of its right of way and spend $1200.00 in money to promote such convenience. This, because in acquiring the right of way by condemnation, the railroad has already paid the then land owner for every element of inconvenience resulting from the presence of the railroad track.

Section 5278 Compiled Statutes of Nebraska 1922, which is the statute authorizing railroads in building their lines to exercise the power of eminent domain, among other things says:

> "No appropriation of private property for use of any corporation provided for in this chapter shall be made until full compensation therefor shall be first made or secured to the owner thereof."

Section 5283 provides:

> "Any railroad corporation may purchase and use real estate for a price to be agreed upon with the owners thereof; or the damages to be paid by such corporation for any real estate taken as aforesaid, when not agreed upon, shall be ascertained and determined by commissioners to be appointed by the county judge of the county wherein such

real estate is situated, in conformity with the provisions of this article."

It is therefore clear that full compensation and nothing less than full compensation for all damages to the land owner is provided for by law. This includes every kind of damage, including inconvenience to the land owner, inaccessibility, severance damages and every kind of damage which can grow out of the cutting in two of the farm and taking a portion thereof.

In *C., B. & Q. Ry. Co. vs. O'Connor,* 42 Neb. 90, it is said in the syllabus:

"A railway company constructed in a public street in front of the lot and dwelling house of plaintiff, fronting on said street, its railway track, and operated its trains and cars thereon. Subsequently the railway company erected in said street, in front of plaintiff's property, a coal house, hoisting apparatus, and side tracks for use in connection therewith. The coal house had a capacity of forty thousand tons, and was filled from cars pushed on said side tracks. The tenders of the engines of the railway company were run on these side tracks and supplied with coal from the coal house. The walls, foundations, and plastering of plaintiff's house were injured by the concussion produced by heavy trains and engines running to and from said coal house. The occupants of plaintiff's premises were annoyed by the ringing of bells and sounding of whistles of the engines hauling cars to and from said coal house and being loaded with coal thereat. Smoke and steam from engines on said side tracks, and dust and soot arising from the loading and unloading of coal at said coal house, drifted on the

property and into the dwelling house of plaintiff, rendering its occupation uncomfortable, and depreciating its rental value. Held (1) that at the time the railway company first constructed its railway track in the street in front of plaintiff's property there at once accrued to the owner of such property, if he was thereby injured, a right of action against the railway company, and that this right of action was barred after four years from the date of the railway company's first occupation of the street; (2) that had the owner of said property brought such action, the measure of damages would have been the depreciation in the market value of the lot by reason of the construction and proper operation of the railway in the street in front of the property for all time; (3) that this depreciation in value would have been the difference in the market value of the lot immediately before and immdiately after the construction of the railway; (4) that in ascertaining such depreciation the cuts or fills made in the street in front of the property, the proximity of the track to the front of the lot, the danger of fire from passing trains, the probability of damage to the house on the lot from jars caused by passing cars and engines, the inconvenience to the occupants of the property arising from the presence and proper and ordinary use of the railway track for all time, the annoyance to such occupants from smoke, cinders, and dust from passing trains and engines, the annoyance caused by the roar of trains, the sounding of whistles and the ringing of bells, and every other fact and circumstance that would have influenced the market value of the property in the mind of a good faith intending purchaser thereof, would have all been proper elements for consideration in determining the damages to plaintiff's property; (5) that all such ele-

ments of damage would have been included in the appraisement, judgment, or settlement made on account of the original construction of the railway in the street; and such elements nor any of them, could not be made the subject of an action for damages brought by the owner of the property against the railway company more than four years after the date of the original construction of the railway in the street; (6) that the side tracks constructed by the railway company subsequently to the original building of its railway in the street were presumably within the purview of the original location of the railway and did not constitute an additional burden to plaintiff's property, and that its building could not be made the basis of a separate and independent action for damages by the property owner against the railway company; (7) that the coal house and hoisting apparatus erected by the railway company in the street in front of plaintiff's property were presumably not within the purview of the original location of the railroad, and constituted additional burdens to plaintiff's property, and invested him with a right of action against the railway company for damages to his property caused thereby; (8) that plaintiff's right of action against the railway company for damages caused to his property by the erection of such coal house and hoisting apparatus was barred in four years from the date of their construction in the street; (9) that the measure of the plaintiff's damages was the depreciation in the market value of his real estate caused by the location of the coal house and hoisting apparatus and their ordinary and proper use for all time; (10) that, in arriving at the amount of such depreciation of plaintiff's property, the proximity of the coal house and hoisting apparatus to the property, the capacity of the

coal house, the danger from fire, the annoyance from soot, smoke, and coal dust, the probability of damage to the house on the lot from the jars of passing trains and engines, were all competent and proper elements for consideration, as all these things were within the realm of results that would naturally flow from the proper and ordinary use of the coal house and hoisting apparatus, and were involved in and a part of the damages which plaintiff could have recovered on account of the original construction of the coal house and hoisting apparatus; and these elements, nor any of them, could not be made the subject of an independent suit by plaintiff against the railway company brought more than four years after the date of the original construction of the coal house and hoisting apparatus."

In *Churchill vs. Beethe,* 48 Neb. 87, damages were sought against the County Commissioners on account of building a culvert in a public highway. The court says concerning the elements of damage in acquiring such highway.

"All damages, immediate or prospective, which may flow from the proper construction and maintenance of an improvement carried on under the power of eminent domain, must be compensated in the original condemnation proceedings."

In the opinion, pages 90 and 91, it is said:

"It is now the settled law of the state that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings

(Omaha & R. V. R. Co. v. Moschel, 38 Neb. 281; Omaha S. R. Co. v. Todd, 39 Neb. 818; Fremont, E. & M. V. R. Co v. Bates, 40 Neb. 381; C., B. & Q. R. Co. v. O'Connor, 42 Neb. 90). In Omaha S. R. Co. v. Todd, supra, it was said: 'In an inquiry whether, and how much, the part of a farm not taken for railroad right-of-way is depreciated in value by the appropriation of a part, evidence as to size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right-of-way; the height of embankments; the depth of ditches; the inconvenience of crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm.' The cases are all those of railroads; but the same principles govern the exercise of the right to eminent domain by counties or municipalities, in the absence of qualifying statutes. The effect of the cases is that in assessing damages for the construction of a railroad, the jury has in view all facts affecting the value of the land which may arise from the proper construction and operation of the railroad—not merely in the manner in which it may be first constructed, but for any proper and appropriate extensions or improvements, so long as the original use is not changed. So with the highway. The owner of adjoining lands is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but for all which would result from a proper construction, improvement and maintenance of the highway, taking into

consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance."

In *Beckman vs. Lincoln and Northwestern Railroad Company*, 85 Neb. 228, it is said in the syllabus:

"In a proceeding to condemn real estate for the purposes of right-of-way for a railroad company, 'the land owner is entitled to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof.' Fremont, E. & M. V. R. Co. v. Meeker, 28 Neb. 94.

"In an inquiry whether and how much the part of a farm not taken for railroad right-of-way is depreciated in value by the appropriation of a part, it is proper for the jury to consider the liability of stock being killed, and the danger from fire from passing trains. See Fremont, E. & M. V. R. Co. v. Bates, 40 Neb. 381."

In the opinion it is said on pages 231 and 232:

"The legal propositions presented will be noticed. It was conceded that the land taken comprised 7 acres in a strip 150 feet wide through plaintiff's quarter section, leaving 12 acres on one side of the track and 141 acres on the other, 12 acres having been previously taken for right-of-way for another track. Plaintiff sought to prove the value of the 7 acres actually taken and the diminution of the value of the remaining land; the whole being a farm in one compact body. To this defendant objected.

Its contention is that the valuation of the 7 acres should be based upon the average acreage value of the farm. There was evidence that the 7 acres was of the best portion of the land, and hence the most valuable. In addition to proving the value of the land actually taken, the court permitted evidence tending to show the value of the whole 148 acres immediately before the condemnation proceedings and after. This ruling was afterwards corrected, and the witness then testified as to the value of the 141 acres before taking, excluding the 7 acres taken. However, this did not materially change the situation as the testimony of the witness relating to values was practically the same. He had estimated the value of the whole 148 acres at $75.00 to $80.00 an acre before the location of the road, and in his subsequent testimony stated that he thought the 141 acres was worth $80.00 an acre before the construction of the road. To the mind of the writer the contention of defendant is a little difficult of comprehension. From the adoption of our present constitution in 1875 to the present time the uniform holding of this court has been that, in the exercise of the right of eminent domain by the condemnation of real estate for purposes of right-of-way, the land owner is entitled to the value of the land actually taken and the dimunition in value of the land not taken as his damages. Fremont E. & M. V. R. Co. v. Whalen, 11 Neb. 585; Republican V. R. Co. v. Arnold, 13 Neb. 485; Republican V. R. Co. v. Linn, 15 Neb. 234; Blakeley v. C. K. & M. R. Co., 25 Neb. 207; C. K. & N. R. Co. v. Wiebe, 25 Neb. 542; Fremont E. & M. V. R. Co. v. Meeker, 28 Neb. 94; Burlington & M. R. R. Co. v. White, 28 Neb. 166. The instructions of the court on the trial followed this rule."

Having once paid for the element of inconvenience to abutting land owners by reason of the construction of the railroad which is in the same condition now on Mr. Holmberg's farm as when originally constructed, we submit that to again be compelled in the manner proposed to contribute substantial sums of money for the convenience of the land owner violates the condemnation award or judgment which was final when made, and in that respect takes the railroad's property without due process of law.

Therefore, we submit that the Statute of Nebraska referred to as construed by the Supreme Court of the State in this case, which would authorize the taking of the railroad's right of way to the extent necessary for this proposed runway, and which takes $1200.00 in money from the railroad violates the constitutional rights of plaintiff in error.

IX.

But the opinion of the State Court says not only is the statute mentioned valid and binding and full authority for what the Railway Commission has ordered, but also that the State Railway Commission under the Constitution of the State possesses *independent* legislative, executive and judicial power. Therefore, it sems to us if this Court should hold that the Statute complained against as applied in this case does violate the 14th Amendment to the Federal Constitution, there would still be left as a legislative basis for the Commission's order the independent legislative power which the State Supreme Court says the Commission may exercise under the Constitution.

We believe that the powers of the State Railway Commission thus construed are themselves a violation of the constitutional rights of plaintiff in error in that it is a denial of equal protection of the law to plaintiff in error and other railroads, in violation of the 14th Amendment to the Federal Constitution, for the people of the State to create for railroads a plan of government which combines all sovereign power, legislative, executive and judicial, in one commission; while for citizens generally the sovereign power is separated into distinct departments, none of which may exercise any of the powers properly belonging to the other departments.

Priop to the year 1906 when the Railway Commission was created by constitutional amendment, the Constitution of Nebraska embraced a plan of government separating the legislative, executive and judicial powers into the three respective department, and Article II of the Constitution of Nebraska provides:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted."

Then followed in Articles III, IV and V, a frame work of government for these several departments of state power with only such minor infringements of one department on the other as seems inevitable in any such scheme of government.

But in 1906, the people amended the Constitution by adding Section 20 to Article IV, which provides:

> "There shall be a State Railway Commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

The Supreme Court, construing this provision, has held in *Hooper Telephone Company vs. Nebraska Telephone Company,* 96 Neb. 245, as well as in the case at bar, that the Commission is vested with *independent* legislative power, etc., so that, conceivably, if an act of the legislature dealing with the Commission's powers should be held invalid, the Commission might still assert the same legislative authority over the subject by virtue of its independent legislative power. It seems apparent that if the act of the legislature challenged in this case is void, because in conflict with the Federal Constitution, that the order of the Railway Commission would be equally void, regardless of whether it was based upon the void act of the legislature, or upon the unconstitutional exercise of the commission's independent legisla-

tive power. But because the Supreme Court of the State in this case has seen fit to re-assert the independent, legislative, executive and judicial power of the State Railway Commission, we feel bound to challenge that power and point out to the Court our reasons.

The Constitutional provision gives the Railway Commission power over "the regulation of rates, service and general control of common carriers". It is apparent that the scope of this power is broad enough to include every valuable right a railroad company might have. The Commission having been granted by the people in the Constitution of the State, according to the construction of the State Supreme Court, independent legislative, executive and judicial power over these rights of railway companies, including plaintiff in error, it is apparent that so far as the people of the State are concerned, they have not surrounded railroads in the protection of their rights with those fundamental guarantees of civil liberty which inhere in the separation of sovereign power into the three distinct departments, legislative, executive and judicial. On the contrary, the people have placed all three departments of power, so far as the rights of railroads are concerned, in the hands of the State Railway Commission, but with this limitation only "as the legislature may provide by law. But in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." Since the legislature of the State is not the State government, but only one department thereof, and the people who alone can make a Constitution or change one, cannot and do not control the legislature except by the indirect method of

suffrage, it would seem that the rights of railroads in the respects pointed out are subject to the absolute power of the Railway Commission so far as the constitution makers are concerned. Why should the people create separate and independent legislative authority to legislate for railroads and their rights, not subject to the constitutional restraints placed upon the general legislature? The latter body, when it passes laws, must meet at an appointed time and place, enact its laws according to prescribed forms within certain times and with numerous restrictions which will insure deliberation and some regard for the bill of rights, yet the Railway Commission with its independent legislative power over railroads may, by order, either with or without a hearing, ceate legislation binding upon railroads but no other class of citizen, and unless by mere chance the legislature has enacted some statute forbidding it or interfering with it, the Commission may exercise independent, judicial power and independent executive power over the same subject governed by its independent legislative power. The principle of thus creating a super-government in the form of a Commission of three men with all sovereign powers over one class of citizen, while the citizens of the State generally enjoy a government whose sovereign powers are divided into the three fundamental departments, no one of whom may trangress upon the rights of the other departments, is surely as dangerous today, if not more so, than in earlier times when earnest thought was given to the subject.

Mr. Madison, writing in the Federalist, Pamphlet No. 46, says:

"No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patriots of liberty, than that on which the objection is founded. (Uniting all departments of government under one head). The accumulation of all powers, legislative, executive, and judiciary, in the same hand, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the Federal Constitution therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system."

And again he says, explaining the arguments of Montesquieu on the subject:

"The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. Were the power of judging joined with the legislative, the life and liberty of a subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

Mr. Jefferson, writing on the same general subject says in his notes on the "State of Virginia", at Page 195; referring to the fact, as he viewed it, that

the legislative department of that state was gradually drawing unto itself all sovereign power:

> "All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating these in the same hand is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppresive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one should transcend their legal limits without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct so that no person should exercise the powers of more than one of them at the same time."

Mr. Madison then concludes his argument with these words:

> "The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."

We submit that the equal protection of the law contemplated by the 14th Amendment to the Federal Constitution forbids such a discrimination in the character of government for the people of a State generally as compared to the railroads in that State engaged in the business of common carrier. The language of this Court in *Truax vs. Corrigan*, 257 U. S. 312:

> "The equal protection clause was aimed at undue favor and individual or class privilege, on the one hand and at hostile discrimination or the oppression of inequality on the other; it secures equality of protection not only for all, but against all, similarly situated; it is a pledge of the protection of equal laws,"

seems especially applicable. Of course, the equal laws contemplated in the 14th Amendment embrace constitutional provisions as well as statutory provisions of a State. For the same reason that the legislature of a State has no right to discriminate unjustly against any class of citizen, the people of a state have no right to discriminate, in building their Constitution, against any class of citizen.

Therefore, if the order of the State Railway Commission in this case can conceivably emanate from its *independent legislative power* under the State Constitution, we challenge it as void under the 14th Amendment. The Commission has no independent legislative power, and can have none, under the 14th Amendment to the Federal Constitution which will allow it by order to confiscate the property of plaintiff in error for private use without compensation, nor which will authorize the Commission to take from plaintiff in error in addition $1200.00 for the private advantage of an individual.

CONCLUSION.

In the final analysis, this case is one where an attempt is made both by legislative enactment and order of a State Commission, under the guise of the police power, to deprive the railroad company of a portion of its private property, not for public use, but for private advantage, and in addition, to compel the Railroad Company to make a substantial contribution to the private convenience of a private land owner. The public is in no manner involved, under the facts shown in the record. Neither the public safety, health, convenience, nor welfare will be influenced in any degree by the proposed improvement. It cannot, in the nature of things, affect anyone but Mr. Holmberg and the Railway Company. We earnestly invoke the protection of the 14th Amendment to the Constitution of the United States against the confiscation of private property of plaintiff in error for the private advantage of defendant in error.

Respectfully submitted,

WYMER DRESSLER,
Counsel for Plaintiff in Error.

ROBERT D. NEELY,
of Omaha, Nebraska,

RICHARD L. KENNEDY,
Of St. Paul, Minnesota,

R. N. VAN DOREN,
of Chicago, Illinois,

Of Counsel.